STATE OF CALIFORNIA

ENDORSED FILED
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BILL JONES
SECRETARY OF STATE

OFFICE OF ADMINISTRATIVE LAW

In re:	)	**1999 OAL Determination No. 16**
Request for Regulatory Determination filed by LOUIS R. FRESQUEZ regarding Administrative Bulletin Number 96/23 of the DEPARTMENT OF CORRECTIONS and a memorandum dated January 28, 1997 concerning inmates at CALIFORNIA STATE PRISON, AVENAL[1]	)	**[Docket No. 97-021]**
	)	**May 25, 1999**
	)	**Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: **CHARLENE G. MATHIAS, Deputy Director**

HERBERT F. BOLZ, Supervising Attorney
CRAIG S. TARPENNING, Senior Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that a statewide departmental directive concerning prisoners with hearing or vision impairments was a pilot program exempt from the Administrative Procedure Act and was in fact contained in a California Code of Regulations provision at the time of this request. The Office of Administrative Law further concludes that a related memorandum from the warden of one state prison is not subject to the APA because of a special express APA exemption covering rules applying solely to one particular prison, if specified statutory conditions are met.

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DECISION [2,3,4]

The issue presented to the Office of Administrative Law ("OAL") is whether the following rules are regulations" required to be adopted pursuant to the APA:[5]

(1) Administrative Bulletin Number 96/23 ("AB 96/23") of the Department of Corrections, in particular the "Yard Identification Procedures" on page 14, which require hearing and/or visually impaired inmates to wear a yellow identification vest whenever outside the housing area. Page 14 is attached to this determination as Appendix "A" following the endnotes.

(2) The memorandum dated January 28, 1997 from Warden M. K. Madding of the California State Prison, Avenal ("Avenal"), which provides:

> ". . . all inmates housed at Avenal State Prison who have been identified as meeting the criteria for visually and/or hearing impaired are required to wear yellow identification vests . . . whenever they exit a building and whenever inside a building where weapons have been posted. . . . Inmates housed in Administrative Segregation will be required to wear the vest whenever they are out of their cells and especially while on the exercise yard. . . ."

The quoted Avenal rules do not appear in AB 96/23. The Avenal memorandum is attached to this determination as Appendix "B" following the endnotes.

OAL concludes that the first rule challenged by Mr. Fresquez was in fact an APA exempt pilot program contained in a provision of the California Code of Regulations at the time of his request, and is currently being implemented pursuant to court order. The second rule challenged by Mr. Fresquez is not subject to the APA because of a special express APA exception for rules applying solely to one particular prison, if specified statutory conditions are met.

DISCUSSION

Louis R. Fresquez is an inmate at the California State Prison, Avenal. On November 28, 1997, he requested OAL to determine whether the rules enumerated above are invalid since they were not adopted in compliance with the APA. Mr. Fresquez also contends that these rules result in unnecessary hardship on those required to wear the vests and are violative of due process and result in a denial of equal protection.

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT OF CORRECTIONS?

Government Code section 11000 states:

> "As used in this title [Title 2. "Government of the State of California" (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

The APA narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[6] The Department is in neither the judicial nor legislative branch of state government. There is no specific statutory exemption which would permit the Department to conduct rulemaking without complying with the APA at this time.

Penal Code section 5058, subdivision (a), declares in part that:

> 'The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]*. . . . [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments. However, effective January 1, 1995,[7] Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements in subdivisions (c)[8] and (d) which will be discussed later.

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations" and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[9] the California Court of Appeal upheld OAL's two-part test[10] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*

- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is guided by the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"[11]

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established. . . ."[12] But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."[13]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)[14] held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.[15] Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities

are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

> ". . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it*. . . . [Emphasis added.]"[16]

A. DO THE CHALLENGED RULES CONSTITUTE "STANDARDS OF GENERAL APPLICATION?"

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[17]

Challenged Rule No. 1 -- 1996 Administrative Bulletin

AB 96/23 establishes policies for the initial identification and placement of inmates under the Disability Placement Program (DPP). It establishes operational policies and procedures for housing inmates with disabilities within California correctional facilities. The "Yard Identification Procedures" require hearing and/or visually impaired inmates to wear yellow identification vests when outside the housing area. It applies statewide to all members of a class and is a standard of general application.

Challenged Rule No. 2 -- 1997 Avenal memorandum

This rule applies to all visually and hearing impaired inmates housed at Avenal. It thus is a standard of general application because it applies to all members of an open class.[18]

Having concluded that the challenged rules are standards of general application, OAL must consider whether the challenged rules meet the second prong of the two-part test.

B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?

Penal Code section 5054 declares that

> "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections] . . . ."

Challenged Rule No. 1 -- 1996 Administrative Bulletin

AB 96/23 prescribes rules for the identification, placement, and housing of inmates with disabilities at the prisons. The "Yard Identification Procedures" require in part that hearing and/or visually impaired inmates wear an identifying vest whenever outside the housing area.

Challenged Rule No. 2 -- 1997 Avenal Memorandum

The memorandum dated January 28, 1997 requires in part that hearing and/or visually impaired inmates at Avenal wear yellow identification vests (1) whenever they exit a building, (2) whenever inside a building where weapons have been posted, and (3) if housed in Administrative Segregation, whenever out of their cells and especially while "on the exercise yard."

OAL concludes that the challenged rules implement, interpret, and make specific Penal Code section 5054.[19]

III. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[20] In *United Systems of Arkansas v. Stamison* (1998),[21] the California Court of Appeal rejected an

argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

> "*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.* (See, e.g., Gov. Code, section 16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"[22]

Express statutory APA exemptions may be divided into two categories: special and general.[23] *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations of all state agencies from the APA.

A. DO THE CHALLENGED RULES FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

Challenged Rule No. 1 -- Administrative Bulletin

The Department states in its response that challenged rule no. 1 (AB 96/23) was exempt from the requirements of the APA pursuant to subdivision (d) of Penal Code section 5058.[24] Subdivision (d) of Penal Code section 5058 provides in part:

"The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of the Title 2 of the Government Code under the conditions specified:

(1) Regulations adopted by the director or the director's designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:

(A) A pilot program affecting male inmates only shall affect no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates only shall affect no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates shall affect no more than 10 percent of the total state inmate population.

(B) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this subdivision.

(c) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (2) of subdivision (b) of section 6 of Title 1 of the California Code of Regulations.

The regulations shall become effective immediately upon filing with the Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."

The Department states that AB 96/23 was adopted by the Director as a pilot program regulation pursuant to subdivision (d) of Penal Code section 5058 and was in effect at the time Mr. Fresquez filed his determination.

"Although pilot program regulations are exempt from the provisions established in Chapter 3.5 (commencing with Section 11340) of the Part 1 of Division 3 of Title 2 of the Government Code (GC), pilot program regulations become effective immediately upon filing with the Secretary of State. . . . On October 30, 1996, the CDC filed with the OAL, in the format of an AB, pilot program regulations on DPP. These regulations were approved for printing by the OAL on December 12, 1996 and subsequently filed with the Secretary of State. . . ."[25]

This is in fact the case. The Department submitted AB 96/23 to OAL as a pilot program pursuant to subdivision (d)(1) of Penal Code section 5058 on October 30, 1996. As submitted, AB 96/23 was exempt from the requirements of the APA and from much of OAL's review pursuant subdivision (d)(1) of Penal Code section 5058. On December 12, 1996, OAL filed AB 96/23 with the Secretary of State as new section 3999.1.2 of title 15 of the California Code of Regulations. New section 3999.1.2 became effective immediately on December 12, 1996 when filed with the Secretary of State and remained in effect until October 15, 1998 (two years from the date of the certification by the Director of the Department pursuant to subdivision (d)(1) of Penal Code section 5058).[26] The request by Mr. Fresquez was submitted to OAL on November 28, 1997; eleven months after section 3999.1.2 of title 15 of the California Code of Regulations went into effect. Therefore, at the time of the request by Mr. Fresquez, challenged rule no. 1 (AB 96/23) was in fact a provision in the California Code of Regulations duly adopted pursuant to subdivision (d)(1) of Penal Code section 5058. The Department stated in its response that:

"[P]ursuant to Penal Code (PC) Section 5058(d), pilot program regulations lapse by operation of law two years after the certification attesting that the program met the specifications established in the PC, unless the regulations are formally adopted through the Administrative Procedure Act (APA) process. The pilot regulations were in effect at the time Mr. Fresquez filed his determination. However, they have since lapsed by operation of law, effective October 15, 1998. . . ."

"The CDC recognizes its obligation to comply with the provisions of the APA and has commenced taking the necessary steps to comply with all statutory requirements. The CDC is aware that a Request for Determination relates to the premise that the CDC is enforcing, utilizing, or attempting to

enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is a regulation as defined in GC Section 11343, subsection (g). The CDC concedes that, since the lapse of the pilot program regulations on the DPP, it has not completed the APA process. Nonetheless, the CDC is lawfully operating the DPP pursuant to the terms of the Order of January 8, 1999, by the Honorable Claudia Wilken, Judge of the United States District Court, Northern District of California, in Armstrong v. Wilson (now Armstrong v. Davis), approving the CDC's Disability Placement Plan in the Court Ordered Remedial Plan . . . ."[27]

This also appears to be the case. In the Order Resolving Outstanding Issues dated September 16, 1998 by the Honorable Claudia Wilken, United States District Court, Northern District of California, in *Armstrong v. Wilson* (No. C 94-02307CW), the court ordered the Department of Corrections to comply with AB 96/23, as modified, in apparent anticipation of the impending lapse by operation of law of new section 3999.1.2 of title 15 of the California Code of Regulations.

" Defendants explain that the AB is scheduled to expire in the fall of 1998, that they never intended the AB to be a permanent document, and that they wish to enact their remedial plans as a regulation. The Court will order Defendants to comply with the AB, as modified during the meet and confer process and . . . this Court's orders, but also establishes a procedure by which Defendants must incorporate these plans into a single document. The Court will then issue a superseding order requiring Defendants to comply with this single document. If Defendants also wish to enact these remedial plans as regulations, they may do so."[28]

On January 8, 1999, this same court in its Order Directing Defendants to Comply with Remedial Plan ordered the Department to comply with the remedial plan which, like AB 96/23, requires hearing and vision impaired inmates to wear identifying vests at all times when outside of the inmate's housing area, or when outside the inmate's cell.[29]

"The parties have prepared the Remedial Plan attached as Exhibit 1, to include matters Defendants originally proposed, matters as to which the

parties agreed in the meet and confer process, and matters which were ordered by the Court. The Court orders Defendants to comply with the Remedial Plan attached as Exhibit 1. . . ."[30]

A copy of the "Yard Identification" procedures contained in the "Court Ordered Remedial Plan Amended Pursuant to Partial Stay of January 8, 1999" is attached to this determination as Appendix "C" following the endnotes. Of course the "Yard Identification Procedures" in challenged rule no. 1(AB 96/23) have since January 8, 1999 been superseded by these provisions and no longer have any effect.

Challenged Rule No. 2 -- 1997 Avenal Memorandum

Penal Code section 5058, subdivision (c), states, in part, that:

> "(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:
>
> > (1) *Rules* issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:
> >
> > > (A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
> > >
> > > (B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public. [Emphasis added.]"

This statutory language indicates that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

In determining whether a "local rule" of the Department of Corrections falls within the scope of the statutory local rule exception, OAL determines whether the rule, though officially designated as addressing a matter of solely local concern, in reality addresses an issue of statewide importance.

Being labeled a "local rule" by the issuing agency is not dispositive. Whether a state agency rule is subject to the APA (in other words, is a "regulation" within the meaning of the APA) does not depend solely on the official designation of the agency action. According to the California Court of Appeal: "[i]f the action is *not only of local concern, but of statewide importance,* it qualifies as a regulation despite the fact it is called 'resolutions,' 'guidelines,' 'rulings' and the like." (Emphasis added.)[31]

Except to the extent that challenged rule no. 2 merely restates portions of AB 96/23 (Appendix A) and the Court Ordered Remedial Plan of January 8, 1999 (Appendix C), we conclude that challenged rule no. 2 represents the individual warden's response to the particular circumstances present at the California State Prison, Avenal, and is limited in its application to that one facility. Nowhere in the record of this request is there any indication that challenged rule no. 2 has any effect or significance outside of California State Prison, Avenal. There is no indication in the record that this rule is an invalid restatement of an invalidly issued statewide rule,[32] and no indication that the challenged rule applies to other prisons. Thus, OAL concludes that challenged rule no. 2 is a "local" rule applying solely to one particular prison and, if the two statutory conditions have been satisfied, falls within the scope of the express specific statutory exemption found in Penal Code section 5058.

In his request for determination, Mr. Fresquez also contends the challenged rules result in unnecessary hardship on those required to wear the vests, and are violative of due process and result in a denial of equal protection. OAL's authority here does not extend to determining whether the challenged rules are necessary or constitutional. OAL's authority is limited to determining whether an uncodified state agency rule has been issued in violation of Government Code section 11340.5.[33]

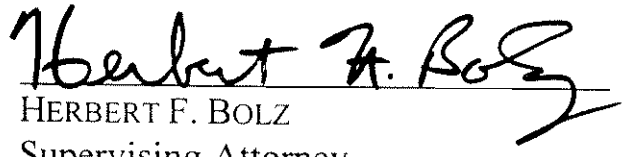
The Department in its response has indicated that it is in the process of adopting regulations in this regard pursuant to the APA.[34] When this rulemaking is submitted to OAL, OAL will consider all comments submitted to the Department

during the public comment period and will review the proposed regulations for compliance with the six statutory criteria of Government Code section 11349.1. Two of these criteria are "necessity" and "consistency."

CONCLUSION

For the reasons set forth above, OAL finds that challenged rule no. 1 was in fact an APA exempt pilot program contained in a California Code of Regulations provision at the time of this request (and after lapsing has been implemented pursuant to court order) and that challenged rule no. 2 is not subject to the APA because of a special express APA exception for rules applying solely to one prison, if specified statutory conditions are met.

DATE: May 25, 1999



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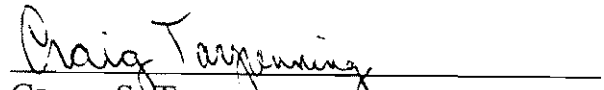

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ENDNOTES

1. This Request for Determination was filed by Louis R. Fresquez, E-26812, 650-1-30-L, P.O. Box 9000, Avenal, CA 93204. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 485-0495.

2. This determination may be cited as **"1999 OAL Determination No. 16."**

   Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

   Government Code section 11340.5, subdivision (d), provides that:

   > "Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

   Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an unmodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.

4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

   > "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless
   >
   > > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]"

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that unmodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

6. Government Code section 11342, subdivision (a).

7. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules,"see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.

8. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.

9. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite

cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

10. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, . . . slip op'n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*]."

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

11. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

12. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.

13. *Id.*

14. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

15. *Id.*

16. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

17. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

18. Previously, relying upon language in case law, OAL had concluded that a rule applying solely to one prison was not a standard of general application because only rules applying statewide to all prisoners were of "general" application. Amendments to Penal Code section 5058 in 1994 have superseded this approach. Though agreeing that so-called "local rules" are not subject to the APA, the Legislature impliedly rejected OAL's rationale for reaching this conclusion. Penal Code section 5058, subdivision (c) states in part that rules applying solely to one particular prison "are deemed not to be 'regulations' as defined in subdivision (b) [now (g)] of Section 11342 of the Government Code." Section 5058 implies that but for the addition of subdivision (c), a rule applying solely to one particular prison could be found to constitute a "regulation" within the meaning of the APA. Thus, necessarily, a rule applying solely to one particular prison could constitute a standard of general application.

    Penal Code section 5058, subdivision (c), we note, is a special express statutory APA exemption. Accordingly, we conclude that the applicability of this subdivision should be analyzed under the "APA exemption" heading, in part III of this determination.

19. See also the federal Americans with Disabilities Act, especially Title 42, United States Code, section 12132.

20. Government Code section 11346.

21. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

22. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

23. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).

24. Agency response, p.2.

25. Agency response, p.2.

26. Agency response, p.2.

27. Agency response, pp.2 and 3.

28. Order Resolving Outstanding Issues (No. C 94-02307CW), pp.78-79.

29. Order Directing Defendants to comply with Remedial Plan, p.4.

30. Id.

31. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.

32. OAL has found that such restatements fail to qualify as true "local rules."

33. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations are proposed by the Department under the APA, OAL will review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)

34. Agency response, p.2.

2. Safety and Security: The CDC shall provide reasonable modifications to the known physical or mental limitations of a qualified inmate/parolee with a permanent disability in a manner consistent with ensuring that the *safety* and/or *security* of staff, inmates/parolees, or the public is maintained.

Legitimate safety and security concerns shall take precedence over any modification afforded inmates/parolees with disabilities and may result in the temporary or permanent suspension of any such modification for cause. The CDC is not required to provide modifications for inmates/parolees with disabilities if the modification poses a threat to the *safety* and/or *security* of staff, inmates/parolees or the public.

a. General Identification/Notification Procedures:

- Yard Identification Procedures: Whenever a hearing and/or visually impaired inmate is assigned to an institution/facility or RC, he/she shall be issued a bright yellow vest to be worn for purposes of identification in the event of an emergency situation. The inmate assumes liability for the vest at the time of issue. The inmate shall receive temporary issue of a bright yellow vest at the RC. It is a mandatory requirement for hearing and/or visually impaired inmates to wear the vest whenever he/she is outside of the housing area. Each vest shall be labeled by stencil or silk screening of three-inch lettering to indicate "Hearing Impaired" or "Visual Impaired" across the back of the vest. Upon departure from the RC, the inmate shall return the vest to the appropriate staff.

  Within five working days of arrival at the designated institution/facility, the hearing or visually impaired inmate shall receive a permanent issue of a bright yellow vest and shall be required to wear the vest whenever he/she is outside of the housing area. The vest shall be worn over the outer shirt or jacket. Equally effective communication shall be used for inmates to acknowledge receipt of property (vest) on the inmate property card. Also, a copy of the ID card/picture for hearing and/or visually impaired inmates shall be maintained with the inmate roster in the unit office or control booth to alert unit staff.

- Public Address and Alarm Systems: Ensure that policy, written procedures, and post orders exist which instruct staff to contact DPP inmates(s), using an effective means of communication to provide them access to public address announcement, and/or reporting instructions, (i.e., visiting, yard release/recall, count, lock-up, unlock, etc.).

Appendix "A"

MEMORANDUM

DATE : JANUARY 28, 1997

TO : ALL CONCERNED

FROM: DEPARTMENT OF CORRECTIONS, CALIFORNIA STATE PRISON - AVENAL

SUBJ : YELLOW IDENTIFICATION VESTS FOR VISUAL AND HEARING IMPAIRED INMATES

In accordance with the departmental plan for the programming of visually and hearing impaire inmates, all inmates housed at Avenal State Prison who have been identified as meeting the criteri for visually and/or hearing impaired are required to wear yellow identification vests with th specific wording "VISUAL IMPAIRED" or "HEARING IMPAIRED" whenever they exit building and whenever inside a building where weapons have been posted. This is required so tha staff can quickly identify inmates who may be unable to comply with orders in an emergenc situation, due solely to their disability. Inmates housed in Administrative Segregation will b required to wear the vest whenever they are out of their cells and especially while on the exerci yard.

Therefore, effective February 11, 1997, all inmates identified as meeting the criteria for visu and/or hearing impaired shall be issued the appropriate yellow vest and, shall be informed writing of the above policy. This information should be reduced to a 128B which is to be placed the individual inmates respective Central File with copies to the inmates Medical File, the respecti housing unit officer station, the facility clothing distribution staff, and the inmate. The inma should sign and date the Chrono as acknowledgment that they have been informed of this policy.

Effected facility managers will coordinate the identification of the above inmates with the facil clothing distribution staff for the immediate distribution of the yellow vests.

M. K. MADDING
WARDEN

cc: Department Heads
ADA Coordinator

Appendix "B"

H. INSTITUTION PROCEDURES

1. NOTICES, ANNOUNCEMENTS, AND ALARMS

a) Written Materials

Each institution/facility shall ensure that the California Code of Regulations, notices, orientation packages, announcements and similar printed materials which it distributes to inmates are accessible to inmates with disabilities. Accommodations such as large print, computer assisted devices, audiotapes and Braille shall be given when necessary. Institution staff shall provide the assistance and equipment necessary to all inmates with disabilities on a case-by-case basis to ensure that inmates who have difficulty reading and/or communicating in writing will be provided reasonable access to forms, regulations, and procedures.

b) Verbal Announcements and Alarms

Each institution/facility shall ensure that effective communication is made with inmates with disabilities regarding public address announcements and reporting instructions, including those regarding visiting, yard release and recall, count, lock-up, unlock, etc. Local policies, procedures and post orders shall be adopted to reflect this obligation.

2. SPECIAL IDENTIFICATION

Custody staff for each housing unit to which a hearing or vision impaired inmate is assigned shall maintain a copy of the identification card/picture for that inmate with the inmate roster, to alert unit staff to provide for the special needs of the inmate.

3. YARD IDENTIFICATION

a) Each inmate identified as having a hearing or vision impairment sufficiently severe as to affect placement shall be issued an identifying vest. The vest shall indicate that the person wearing it has a vision or hearing impairment.

b) Upon verification on the CDC Form 1845 that the inmate's hearing or vision impairment requires placement in a designated DPP facility, medical staff shall issue a CDC Form 128C, documenting the inmate's permanent authorization to possess the vest.

c) All hearing or vision impaired inmates who are pending CDC Form 1845 verification or who have been verified to require placement in a designated DPP facility shall wear the vest at all times outside the inmate's housing area or cell. The vest shall be worn over the inmate's outer clothing. All hearing or vision impaired inmates who are able to function in a nondesignated facility due to a prescribed health care appliance shall be temporarily issued an identifying vest whenever their prescribed health care appliance is not available or working properly. Those inmates shall wear the vest outside the inmate's housing area or cell at all such times.

d) The v[illegible] is a prescribed health care [illegible]liance, as provided in CCR Section 3358, retained by the inmate in accordance with that section.

4. EVACUATION PROCEDURES

a) Each institution/facility shall ensure the safe and effective evacuation of inmates with disabilities.

b) Local evacuation procedures shall be adopted at each facility.

c) All inmates with disabilities will be provided evacuation/emergency procedures in an accessible format during orientation.

5. COUNT

Inmates who have a verified disability that prevents them from standing during count shall be reasonably accommodated to provide for effective performance of count.

Each institution/facility shall develop local procedures to reasonably accommodate inmates who are unable to stand for count due to a verified disability.

6. RESTRAINTS

Inmates who have a disability that prevents application of restraint equipment in the ordinarily prescribed manner shall be afforded reasonable accommodation, under the direction of the supervisor in charge. Mechanical restraints shall be applied so as to assure effective application while reasonably accommodating the inmate's disability.

7. SEARCHES

a) Inmates who have a disability that prevents the employment of standard search methods shall be afforded reasonable accommodation under the direction of the supervisor in charge. Such searches shall be thorough and professional, with safety and security being the paramount concern.

- Inmates who use wheelchairs and who have severe mobility impairments and are unable to perform standard unclothed body search maneuvers shall be afforded reasonable accommodation to ensure a thorough search, including body cavities. If the search includes removal or disassembly of a health care appliance, it shall be conducted in a clean setting.

- If a search requires removal of the appliance, a compliant inmate shall be allowed to remove the appliance and tender it to staff. If forcible removal of an appliance from an noncompliant inmate is necessary, it shall be removed only by qualified medical personnel, provided that it is safe for them to do so.

- No inmate/parolee shall be required to lie or sit on extremely hot or cold surfaces to perform strip search maneuvers.